the disputed land. The prayers in his chamber summons filed on 23 July 1996 already quoted are very clear.

Fourthly, although in his chamber summons for an application for temporary injunction the applicant had made prayers limited to just transferring the property on plot 8, Block 47, Kijitonyama, when the respondent undertook to maintain the *status quo* which was duly recorded as a court order, the court having believed that it was an honest undertaking any other activity which could change the existing state of affairs between the parties but related to the disputed property become entangled. On those premises, any construction or development thereon would constitute contempt for court, clear and simple, as it negates the order.

The question however is, whether that order of maintaining the *status quo* has more force in terms of duration than would a normal temporary injunction. Under Order XXXVII, rule 3 Criminal Procedure Code as amended by G.N. 508 of 1991 a temporary injunction lasts for 6 months unless renewed which period however should not exceed 12 months in aggregate. The purpose behind the introduction of this new condition was to curb the otherwise prevalent shrewdness of parties who upon securing a temporary injunction, never bother to prosecute their cases if not creating a whole lot of excuses to make sure that the matter is not finalized or takes unduly a long time. This would be so, in most cases, because they would have already secured what they want or they would be aware that the scales of justice lean against them. Now, if temporary injunction is explicitly given a limited life span, can an order for maintaining a *status quo*, which order is generally wider in ambit, have unlimited duration? In my considered view the answer is in the negative. The conditions provided under Order XXXVII, rule 3 Criminal Procedure Code should rule as well on such order. I thus agree with the respondent that the order given on 21 May 1997 and which was not renewed lapsed six months later, i.e. 21 November 1997, hence of no effect thereafter.



And yet still, even if it was still in force, on the facts of this matter and the uncertainty and unreliability of the applicant's affidavit, which, as I have already indicated, contains some lies, I am not convinced that the respondent breached the Order. His explanation that by the time the Order was given the main construction had already been made, and that the finishing touches were made with applicant's approval stand unchallenged. He who alleges must prove. The applicant should have convinced us as to when the alleged violation took place. The Order was given on 21 May 1997. The present application was filed on 13 October 1998. The affidavit alleges that respondent has constructed a two storey building after the order. If that is the case where was the applicant? Could he simply keep silent if indeed respondent was effecting such developments at the alleged speed? What then activated him when he subsequently decided to file the said application? I am not convinced by the applicant's allegations as they are not supported either by direct or even circumstantial evidence. There is no breach which has been established entitling this court to condemn the respondent for Contempt of court. The application is dismissed with costs

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## JOSEPH MNIGA *v.* ABASS FADHIL ABASS AND HASSAN KHATIB PANDU

HIGH COURT OF ZANZIBAR
AT VUGA

(Garba Tumaka, DC.J.)

CIVIL APPEAL No. 34 OF 1999

(From the Judgment and Decree of the Regional Magistrate's Court at Vuga, dated July 1999, in Civil Case No. 18 of 1999)

*Civil Practice and Procedure – Appeal – Limitation of time to appeal – Computation of time – Time spent to obtain a copy of the decree or order*

*appealed against is excluded – Section 100(2) of the Civil Procedure Decree Chapter 8.*

*Civil Practice and Procedure – Set off – Appellant's remedies – Appellant paid expenses for the vehicle – Whether he can recover by set off.*

*Contract – Discharge of – Breach of fundamental term – Whether breach of fundamental term may discharge contract by frustration.*

*Agency – Formation of – Agent acting for principal – Whether the car possessed by agent may be said to be possessed by the owner.*

The appellant and the first respondent entered into an oral contract of hire of a car at a rental price of TZS. 10 000 per day. In May 1996 the appellant paid TZS. 900 000, being rentals for May, June and July 1996 and the vehicle was given to him. No further payments had been made and the appellant promised, in writing at the police station, to pay up the outstanding rentals but then only paid TZS. 100 000. The first respondent then sued the appellant and the second respondent for the recovery of his money in the sum of TZS. 9 000 000 per annum. The trial Regional Magistrate found in his favour. On appeal (by the appellant) the first respondent raised a preliminary point that the appeal was filed out of time.

**Held:** (i) In terms of section 100(2) of the Civil Procedure Decree Chapter 8, the time used for obtaining a copy of the decree or order appealed from is excluded in computing time; this appeal, therefore, was filed in time;

(ii) As the car after being hired by the appellant operated for three consecutive months, there was no fundamental breach of a term of the contract of hire which may lead to frustration of the contract.

(iii) As the second respondent instructed Khamis Hasani to act on his behalf during the time he was hospitalized, the car was in the possession of the second respondent's agent and such-agent within the meaning of section 179 of the Interpretations Section, Chapter 149.

(iv) The appellant was entitled to set off the sum of TZS. 100 000 and 90 000 from the total sum owed being the total sum paid for rentals for the first three months and payment made at the police station.

***Appeal Dismissed***



Cases referred to:

(1) *Karsales (Harrow) Ltd v. Wallis* [1956] 2 AC ER 866 CA

(2) *Photo Productions Ltd v. Securers Transport Ltd* [1980] CA 822

(3) *R v. Sebastian Ndomba* [1986] T.L.R. 190.

(4) *Hutton v. Warren* (1836) 1 M and V 466.

Statutory provision referred to:

(1) Civil Procedure Decree Chapter 8, section 100(2)

*Mr Salum Mnkonje,* for the Appellant

## JUDGMENT

(Dated 4 January 2000)

**Garba Tumaka, DC.J.:** This is an appeal by the appellant, Joseph Mniga, against the judgment of the Regional court at Vuga, given in July 1999, in Civil Case Number 18 of 1999. Being dissatisfied with this Judgment, the appellant lodged an appeal before this court, represented by Mr Salum Mkonje, whilst the respondents elected to represent themselves.

The salient facts are as follows:

The first respondent, Abass Fadhil Abass, had sued the appellant herein, Joseph Mniga and Hassan Khatib Pandu for the recovery of his money in the sum of TZS. 9 000 000 (nine million) with interest at 30% per annum, being the rental/hire price for his car, with Registration Number ZNZ 9640.

The first defendant, Hassan Pandu, had in his possession, a vehicle with the above stated Registration Number belonging to Abass Fadhil Abass, and the appellant indicated through an agent, his interest in hiring the vehicle for use as "*daladala*". It was orally agreed that a rental of TZS. 10 000 per day would be payable and, in furtherance, the vehicle

was handed over to Mr Mniga in May 1996, who paid the sum of TZS. 900 000 (nine hundred thousand shillings) being rentals for the months of May June and July 1996.

Thereafter, there were no further payments:

Mr Pandu fell ill, was hospitalised and ultimately had his right leg amputated and all attempts by the first defendant to get to him failed, whereafter he instructed one Khamis Hassan to follow up on his behalf in trying to get to Mr Mniga. The situation degenerated to the matter being reported to the police in an attempt to get Mr Mniga to pay up the outstanding rentals and he promised in writing at the police station to do so on the 2 March 1997, which promise was apparently unfulfilled.

The plaintiff (first respondent hereat) in his evidence recounted how the agreement was entered into in respect of his vehicle with the second respondent (appellant hereat) through the first respondent and how the appellant reneged on his agreement to pay 10 000 daily after paying only the first three (3) installments and how all efforts to get him to pay up failed (including resorting to the intervention of the police) he called no witness in his support.

Mr Hassan Khatib Pandu, the first defendant (and second respondent hereat), virtually corroborated the plaintiff's evidence, concluding his evidence that even though he instructed Mr Hamis Hassan to follow up on the matter on his behalf, the appellant managed to pay only TZS. 100 000 at the Madema Police Station.

The second defendant, (appellant herein) in his defence gave evidence to the effect that he hired the above stated vehicle through the first defendant in May 1996, for an agreed daily rental of TZS. 10 000 even though the agreement was unwritten. He said he paid the sum of TZS. 900 000 for the first three months and paid an additional sum of 250 000 at the Anti-Corruption Unit of the police where the matter was reported. He couldn't pay the due rents, due to business difficulties he encountered, which claim was refuted by both the plaintiff and the first defendant.



In addition, he said the vehicle was grounded and that fact he made known to the owner of the vehicle. That was denied by the plaintiff and the first defendant. In what would appear as further defence, he stated that the vehicle had neither a road licence nor an insurance policy cover as a result of which it couldn't operate and this he reported to the owner, which was also denied. On the whole, he did not deny his indebtedness. He however contended that he could not be rightly ordered to return the vehicle to the owner because it was already with the owner through the owner's agent.

He brought in two witnesses to support his submission:

Mr Ramadhani M. Ahmed, a painter, told the court that, Mr Khamis (defence Witness DW2) and agent to Hassan Khatib Pandu the first defendant, gave him a car for painting, which he did and was paid by the said Mr Khamis. He asked that the car be taken away from his garage several times, all to no avail as the car still remains at his garage.

His second witness, police officer Kondo Hassan Kondo stated that he remembered that Mr Joseph, upon being brought before him (Kondo) at the police station, admitted his indebtedness and even came on about four occasions to make some payments even though he couldn't remember exactly how much he paid.

The learned magistrate couched the issues for determination as (1) In whose custody was the vehicle? (2) If there was any indebtedness, how much and to whom? (3) What are the remedies available? At the conclusion of the case he decided that; the second defendant hired the plaintiff's vehicle; he didn't pay the agreed rental even though he had promised to do so before the police; even if the vehicle had broken down, the defendant never brought this to the knowledge of the owner; that the defendant paid only the sum of TZS. 900 000 together with another sum of TZS. 100 000 which he paid in the police station and that the vehicle was still in the custody of the second defendant.

He consequently ordered that the second defendant should pay the sum of TZS. 9 000 000 being the rental from August 1996 to December, 1998 at the rate of TZS. 10 000 per day and that he should return the vehicle to the first defendant immediately.

The appellant filed 4 rounds of appeal, to wit:

(1) That the trial magistrate erred in law in not finding that the contract was frustrated from first January, 1998, for breach of fundamental terms of the contract by the respondents.

(2) That the trial magistrate erred in law and fact in not finding that the car was in the possession of the plaintiff through his agent and sub-agent.

(3) That the trial magistrate erred in law and fact in not finding that more then TZS. 350 000 was paid through the police to satisfy the debt.

(4) That the trial magistrate erred in law and fact in not giving weight to the fact that major repairs which are the responsibility of the car owner were paid by the hirer hence the need to set-off the costs thereof from the remainder of the debt.

Counsel for the appellant, Mr Mkonje, began with his first ground on the issue of fundamental breach, contending that having the car in good working condition and having it duly licenced and insured are pivotal to bringing a contract to fruition. He submitted that the vehicle had not had its road licence and vehicle insurance revalidated since December, 1996 and thus could not legally ply the road. He cited the Road Traffic Decree, Chapter 135, particularly sections 11, 12, 17, 24 and 34, and Motor Vehicle Insurance Third paty Risks, Chapter 136, Laws of Zanzibar, to support his contentions. The duty of renewal is the respondent's, he further contended.

"The car had no road licence, no insurance ... " he said, quoting from the testimony of Joseph Mniga, the appellant.

"The vehicle had no road licence nor insurance and hence it couldn't operate" he quoted Mniga further.



Further indications of this breach, according to Mkonje, was that the car was not roadworthy and needed major repairs, quoting the first defendant's testimony "the engine of its car also needed some services ... " and for any self-drive contract to be effective, operational, the vehicle must be in a moving condition.

His second ground of appeal was that the vehicle was in the possession of the plaintiff (and not the appellant) through his agents and sub-agents. Mkonje contended that perusing the testimony of Abass Fadhil Abass the plaintiff and first respondent here, from the Record of Proceedings. "Khamis was doing these on behalf of the first defendant. Mr Khatib Hassan was doing all these on my behalf because the said vehicle belonged to me". Further re-iterating this view was the testimony of Khamis Hassan Khatib on page 4 of the Record of Proceedings: " ... The second defendant told me that because he was busy, I had to find somebody who could service the car. I found the garage to service it. The car was welded and painted."

Mr Mkonje contended further that the magistrate's order that the car be immediately handed over to the first defendant could not be fulfilled because the car was taken to the mechanic by the defendant's (respondent herein) agent and the mechanic insisted that only the person who brought the car could collect it from him.

The third ground of appeal was to the effect that more than TZS. 350 000 was paid by the appellant to off-set the debt and the trial magistrate did not acknowledge and appropriately deduct same. Mr Mkonje's grouse here is that even though the magistrate in his judgment from the Record of Proceedings agreed that the sum of TZS. 900 000 and an additional sum of TZS. 100 000 was paid by the second defendant/appellant, he did not deduct the same from the total sum owed.

Mr Mkonje contended that his client also gave two tyres costing TZS. 90 000 to the plaintiff second respondent and this was duly admitted on page 3 of the Record of Proceedings. "Yes, the second defendant gave me 2 tyres costing about TZS. 90 000" by the plaintiff.

The appellant testified that he paid TZS. 250 000 and a further sum of TZS. 50 000 at the Madema Police Station, which Mr Mkonje contended was not controverted.

Relying on the evidence of police officer Kondo Hassan Kondo, " ... Mr Joseph came to me and accepted and admitted that he is indebted to Mr Khamis. He admitted to pay the amount. He came about four times, brought some money which I can't remember the exact amount. The paid money was given to Khamis Hassan", Mr Mkonje submitted that the trial magistrate should have made a finding on this, i.e. to state whether he believed or disbelieved this testimony.

Finally, Mr Mkonje contended that major repairs which are the responsibility of the car-owner were paid for by his client and this was not deducted from the balance of his client's indebtedness.

He therefore prayed the court that these costs which were not taken into consideration by the magistrate court be taken cognisance of. He noted that this contract being an oral one, most terms are implied with particular reference to the customs and usages governing vehicle hire and usages.

Mr Abass Fadhil Abass, the first respondent elected to represent himself. As far as he was concerned, he had stated all that he had to state at the Lower court and didn't have anything new to add. He had relied on the judgment of the Magistrate's Court which had ordered that he should be paid his entitlement and his car returned to him.

He said he received 2 tyres from the appellant whilst the money which the Anti-Corruption Unit of the police was supposed to give him hadn't been given to him. In addition, the money for the repairs of the car received by Khamis had not been given to him. He said the reason why the vehicle was being taken from one garage to the other was because the appellant wasn't willing to pay for the repairs. He insisted that the appeal was bad for effluxion of time.

Hassan Khatib Pandu, the second respondent, aligned himself with the testimony and arguments of the first respondent. He stated



that with his incapacitation (amputation) he left all the follow-up on this matter to Khamis. He was however, surprised to hear that he hired out a vehicle not in good condition. "How could I have hired out such a vehicle. The appellant used the vehicle for 3 months and paid for it. How could this have been possible if the vehicle was not in good condition?" He queried.

Responding to these, Mr Mkonje submitted that the appeal was not out of time, adding that Chapter 8 of Civil Procedure Decree stipulates a 90 day period for appeal. From the date of the pronouncement of the judgment, it ends on the 13 October, 1999 whilst if you count from the date of obtaining a copy of the judgment, it ends on the 13 November 1999.

On the issue of possession of the car, he re-emphasised that since the sub-agent draws his authority from the principal, the control of the vehicle was still with the Principal. He contended further that the car was initially in good condition but later on got grounded and thus couldn't be used and this, according to him, was further aggravated by the lack of licence and insurance.

I think it is only appropriate that I start with the issue of this appeal being bad for effluxion of time, being a preliminary and paramount issue upon which every other action of this court will be predicated. Mr Abass Fadhil Abass, the first respondent herein, has seriously contended that this appeal is out of time and should not be entertained by this court. As has been stated by counsel for the appellant, the schedule to Chapter 8 of the Civil Procedure Decree clearly stipulates that the period for an appeal to the High Court is 90 (ninety) days from the date of the order or decree. section 100(2) gives further clarification on how the computation should be done:

> In computing the period of limitations prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.

In the instant, case, as rightly canvassed by Mr Mkonje, if you count from the date of the pronouncement of the judgment, the 90 – day period ends on the 13 October 1999. Whilst if you count from the date of obtaining a copy of the judgment, the period ends on the 13 November 1999. This appeal is therefore clearly within time, and proceedings to enforce a right or claim damages or relief for the infringement of any right is procedurally right. Next is the equally important issue canvassed by the appellant that the trial magistrate erred in law by not finding that the contract was frustrated for breach of "fundamental terms" of the contract by the respondents.

A fundamental term is a term of even greater importance than a condition. It can be described as a term which constitutes the main purpose of the contract and failure to comply with it, is equivalent to not performing the contract. It entitles the injured party to repudiate the contract. Significantly, a party in breach of a fundamental term cannot escape liability by reliance on an exclusion clause, even where this exists. It was so held in *Karsales (Harrow) Ltd v. Wallis* (1).

What it means is that as a consequence of the guilty party's breach, the innocent party is entitled to treat himself as discharged from further liability to perform his yet unperformed obligations towards the guilty party. In the case *Photo Productions Ltd v. Securicor Transport Ltd* (2), Lord Diplock defined Fundamental Breach of Contract as "an event resulting from the failure of one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intentions of the parties that he should obtain from the contract".

I would at this juncture like to adopt what I feel is a very apposite illustration of a fundamental term as espoused in the case, *Karsales (Harrow) Ltd v. Wallis* (*supra*), in which "W" agreed to buy a car under a hire-purchase agreement which included a clause "No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein". One night, the car was towed to W's house by the agent of the finance company and when W found it the next morning, parts of the car were missing, others were broken and it was incapable of self propulsion.



"W" refused to pay the instalments and was sued by the plaintiffs who relied on the exclusion clause to protect them from their obvious liability. It was held by the Court of Appeal that an exclusion clause could not protect them from a breach of the degree and gravity of a fundamental breach.

What this in essence means, is that where a breach is fundamental, even the existence of an exclusion clause that would normally or ordinarily exempt liability is inoperative.

Can it therefore be said in the instant case that there was a breach of fundamental terms consequencing in the frustration of the contract as claimed by the appellant here? In answer to this, I would ask further, was the vehicle supplied and was it self-propelling?

Mr Mkonje contended that "for a car to be fit for a self-drive contract, it must be in a moving condition. Such a car must move. The hirer's only obligation is for minor repairs. I strongly contend that this is a Fundamental Breach of Contract" he concluded.

In answer to the questions I posed earlier, I would be inclined to answer in the negative, ie that there was no fundamental breach consequenting in the frustration of the contract that would enable the appellant here discharge or be discharged of his contractual responsibility. The car was clearly fit for a "self drive contract" to borrow the appellant advocate's words. My view is borne out by the testimony of Hassan Khamis Pandu, the second respondent, when he said " ... I am surprised to hear today that I hired out a vehicle which was not in good condition. How could I have hired out such a vehicle? The appellant used the vehicle for 3 months and paid for it. How could this have been possible if the vehicle was not in good condition."

The appellant himself "corroborated" this in his testimony on page 6 of the Record of Proceedings where he said, " ... For the

first 3 months I paid the whole amount of money. The following two months, I had no work so it became hard for me to pay for the car ... " The reason he didn't/couldn't pay further was because he had no work and not because the vehicle didn't function. " ... because there was no work to do, I failed to pay even the office rent". The problem definitely was not the vehicle but the lack of work to do. Even on his subsequent assertion that the vehicle had mechanical problems, under cross-examination by the first defendant/second respondent here, Hassan Pandu, the appellant confirmed. " ... I never sent it back to you when it was grounded".

The second leg of his argument on breach of fundamental terms was that the vehicle was neither properly licenced nor did it have the Insurance Cover required by law. Mr Mkonje contended that by December, 1996, the road licence and insurance of the vehicle had expired and were not renewed and was thus not legally allowed to ply the roads. The duty of renewal of the insurance and licence lay on the respondent, he said, citing the Road Traffic Decree Chapter 135. He referred to the appellant's evidence on pages 6 and 11 where he said respectively "... the car had no road licence no insurance ... " And "the vehicle had no Road Licence nor Insurance and hence it couldn't operate."

Section 14 of the Road Traffic Decree Chapter 135 Laws of Zanzibar states that: "Any person who uses on a road a vehicle which does not comply with all the provisions of this part ... shall be guilty of an offence and shall be liable to a fine not exceeding five hundred shillings" While section 40 goes on to state "... and on each subsequent conviction, if the vehicle is a motor vehicle, to a fine not exceeding one thousand shillings".

These provisions generally refer to "any person" without categorising owner, hirer or driver. Section 5 of the Road Traffic (Subsidiary) regulations also puts it very clearly "No person shall use, or cause or permit to be used, on a road any vehicle to which these regulations apply unless there is in force in respect of that vehicle a valid licence



issued"; "if any person uses on a road, any motor vehicle or trailer for which a licence in not in force, he shall be guilty of an offence" states section 34(1) of the same regulations.

Similarly, the Motor Vehicle (Third paty Risks) Decree Chapter 136, talks of "any person." section 3(1) states that "Subject to the provisions of this Decree, it shall not be lawful for any person to use or to cause or permit any person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person as the case may be, such a policy of insurance or such security in respect of third party risks as complies with the requirements of this Decree".

Section 3(2) states that "Any person who contravenes the provisions of this section shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings or to an imprisonment for a term not exceeding six months or to both such fine and imprisonment".

The High Court of Tanzania in the case of *Republic v. Sebastian Ndomba* (3) dealt with this issue. The accused was convicted, *inter alia*, of causing a motor vehicle to be used on a road without a Certificate of Insurance and using a goods vehicle without Transport Licence. The trial magistrate, in a misrepresentation of a High Court decision, imposed lenient sentences and failed to comply with a mandatory requirement to disqualify the accused from holding or obtaining a driving licence for some period.

It was held:

(1) While the primary duty to have a policy of insurance for motor vehicles in respect of third parties lies with the owner of the motor vehicle, the law makes it unlawful for any body to use or to cause or permit any other person to use a motor vehicle on a road unless the motor vehicle has an Insurance or Third Party insurance cover.

(2) The consequence of driving a motor vehicle which has no Insurance Cover is equally borne by the owner or anybody in control of the

> motor vehicle and the driver of the motor vehicle irrespective of his status.

It therefore appears to me that the issue of licence and insurance does not afford the appellant a defence. At best, it is an "*in pari delicto*" situation i.e a situation of mutual fault or similar guilty by both parties.

The appellant's next ground of appeal was that the trial magistrate erred in law and fact in not finding that the car was in the plaintiff's (respondent herein) possession through his agent and sub-agent. Mr Mkonje referred to several testimonies in the Record of Proceedings to show that the vehicle was in the possession of the plaintiff. He quoted Mr Abass Fadil Abass, the plaintiff/respondent who said that "... Khamis was doing these on behalf of the first defendant. Mr Khatib Hassan was doing all these on my behalf because the said vehicle belonged to me" On page 3 of the Record of Proceedings. The statement of Mniga Joseph, the appellant/defendant was also quoted "... I instructed Khamis to service it and I would be responsible for the service charge. "Finally on page 7, Mr Mkonje referred to the testimony of DW2, Ramadhani Ahmed where he said " ... Mr Khamis told me to paint his car. I accepted it ... "

I have gone through the Record of Proceedings in my attempt to get who actually was in possession of the vehicle; the plaintiff (respondent) through his agents/sub-agents or the appellant. "Possession" ordinarily defined means "to have in one's actual and physical control; to detain and have exclusive control of; control, care and manage". Section 179 of Interpretations Section Chapter 149 Laws of Zanzibar, defines an agent as " ... a person employed to do any act for another or to represent another in dealings with third parties".

A sub-agent is defined by the same law as a person employed by and acting under the control of the original agent in the business of an agency.

Doubtlessly, Mr Hassan Khatib Pandu (the first defendant) appointed Mr Khamis to act on his behalf in this transaction as confirmed by



the testimony of the defendant appellant, Joseph Mniga "... He brought to me Mr Khamis to act on his behalf." He clearly introduced Mr Khamis as his agent. In the same vein, Mr Hassan Pandu second respondent herein was himself clearly an agent to the plaintiff/first respondent (herein) as confirmed by his testimony at page 3 of the Record of Proceedings, under cross-examination by Mr Mkonje;

> Mr Khatib Hassan was doing all these on my behalf because the said vehicle belonged to me.

Prior to this however, he said, in relationship to the car and the appellant herein:

> ... I refused to be given the said car for services. Mr Joseph gives that car to the mechanics to service. Mr Khamis took the said vehicle from Mkunazini garage ...

From this point, it appears the plaintiff/respondent had declined responsibility for servicing the vehicle and this had been passed over to Mr Joseph. This thinking is further re-inforced on page 4 of the Record of Proceeding I instructed the second defendant to service the motor car. The second defendant, (appellant herein) told me that because he was very busy, I had to find somebody who could service the car. I found the garage to service it. The car was welded and painted." This witness was clearly an agent of the second defendant, who was himself an agent of the plaintiff /respondent. On this particular assignment however, it appears as if Khamis Hassan was "assisting" (for want of a better word) the appellant, Mr Joseph to do what he (Hassan Khamis) thought/felt was Joseph's responsibility. Joseph himself (the appellant) confirms my thinking by his testimony on page 6 of the records "... I instructed Khamis to service it and I would be responsible for the service charge". Mr Khamis was now acting on the directions of Mr Joseph and it could be said that he was doing this in furtherance of the success of his own agency.

Learned advocate for the appellant recalled the testimony of Ramadhani Mohammed Ahmed, DW2, the mechanic, where he said "one day he came, Mr Khamis told me to paint his car. I took the said car from

Amani fresh to Amani Msikitini, he paid me the whole service price, I finished the work and informed him", and sought to conclude that Khamis being the plaintiff/respondent's sub-agent, the said Khamis was acting on his behalf.

I however tend to believe the appellant/defendant's direct testimony that "... I instructed Khamis to service it and I would be responsible for the service charge". In any event, the appellant/defendant's response under cross-examination by the second defendant said it all "I never sent it back to you when it was grounded".

The third ground canvassed by advocate Mkonje was that the trial magistrate erred in law and in fact in not finding that more than TZS. 350 000 were paid through the police to satisfy the debt whilst the fourth ground was to the effect that major repairs, which are the responsibility of the car owner were effected by the hirer and hence needs be off set from the remainder of the debt.I shall take both together because the prayer as a consequence of grounds 3 and 4 is for a declaration that the rental has been fully satisfied.

Going through the Record of Proceedings, it is incontrovertible and uncontroverted that some payments were effected/made by the appellant in the course of this transaction. Acknowledgement of this fact is recorded in the trial magistrates judgment, at page 10 of the Record of Proceedings. Mr Hassan Khatib's evidence as quoted by Mr Mkonje, confirmed receipt of TZS. 100 000 which he sent to the first defendant/second respondent " ... The second defendant managed to pay only TZS. 100 000 which I sent to the first defendant ... "

More significantly, the trial magistrate in his judgment on page 12 of the record of proceeding "...and paid only TZS. 900 000 (being the hire price from May, June and July. It was proved that he paid another TZS. 100 000 ... " Acceded to this contention. Additionally, the plaintiff/second respondent here agreed that he was given 2 tyres costing about TZS. 90 000 " ... yes, the second defendant gave me second tyres costing about TZS. 90 000 ...



Apart from these sums, the appellant contended that he paid a total of TZS. 250 000 to the respondent through the police at the Police Station and that the respondent was not averse to this arrangement. "I agreed with that idea of sending my money at Anti-Corruption ... " as stated in page 3 paragraph 1 of the Record of Proceedings.

Mr Mkonje contended that the trial magistrate made no finding on this, to state that he either believed or disbelieved. It is noteworthy that at page 10, of the Record of Proceedings, in his judgment, the trial magistrate noted the said payment of TZS. 250 000 at Anti-Corruption Unit, "the fact which was denied by the first defendant and the plaintiff," which apparently indicates his disbelief. From his judgment, "... It is not doubtful that the second defendant hired the said motor vehicle on May 1996 and paid only TZS. 900 000 being the hire-price from May, June and July, was proved that he paid another TZS. 1 million before the police station and never paid the remaining sum of money to-date". This, to me, indicates that he did not believe the alleged payment of the said sum and hence his non-reflection for reduction from whatever sum was owed by the appellant.

Similarly, it is contended that the cost of repairs paid for by the appellant ought be subtracted from debt owed by him as the responsibility for repairs was the owner's. It is the appellant's contention that these sums ought to be deducted from what ever sum the appellant is adjudged to be owing. It brings into focus the very important issue of the terms of the contract. It has been clearly stated that the only clear term of the agreement, which was itself oral, is the car rental which was an agreed sum of TZS. 10 000 per day. All other terms can only be inferred from the customs and laws governing vehicle hire, vehicle usage on the road, etc.

Unarguably, all contracts are entered into within the framework of established practices of a society. These practices are recognised as an integral part of a contract to which they relate without being specifically referred to as such; thus contract terms can be implied

## JUDGMENT

(Delivered 25 January 2000)

**Mackanja, J.:** According to the general tenor of the evidence, it is common ground that the present geographical areas constituting Kyagala and Illopa Villages were at one time one village. The area now constituting the Kyangala village was largely pasture land and some parts were marshland. In those days, in the 1920's to be specific, only the Ilopa village was inhabited; its inhabitants were later allocated farms in Kyangala. With the passage of time Kyangala and Ilopa were created into two villages. The respondents inhabit Ilopa village while the plaintiff is the Chairman of the Kyangala Village Council.

The plaintiff lodged a civil action before the Mwaya Primary Court with a prayer that Ilopa villagers be declared to be trespassers in Kyangala Village and that they be evicted. Several witnesses were called by both sides but the truth seems to have emerged when the trial court visited the *locus in quo*.

The trial court observed that residents of the two villages had farms in Kyangala. It was further observed that the farm boundaries have been there for a long time. In fact the land is basically under paddy, with permanent crops such as palm trees and old mango which spot the various farms.

The findings of the trial court find favour with the testimony of Gasswell Mwakalukwa (SU3) who is the District Chairman of the Chama cha Mapinduzi in Kyela District. He got wind of a violent incident involving the warring villagers after some Kyangala villagers had accosted Ilopa villagers who have farms in Kyangala. The assailants having been reported to the hounds of justice, the matter was taken to court where they stood trial. He testified that people from Ilopa as well as those from Kyangala had long established land titles in Kyangala village, rights which they had inherited from their forefathers. He testified further that the area, the centre of the controversy, was once marshaland which had long since been reclaimed. Because he



knew the land well he called a joint meeting of the inhabitants of the two villages at which their differences were ironed out. As a result Kyangala villagers dropped the claim for exclusive rights over the land in their village; on their part Ilopa villagers dropped criminal charges against some Kyangala villagers after their land rights were recognized. It was after this reconciliation, and in disregard of what had been agreed upon, that the plaintiff brought this suit on behalf of the Kyangala Village Government against twenty-one Ilopa villagers who were alleged trespassers in his village. He lost the case in a unanimous decision of the trial court. He went on to lose the first appeal before the District Court of Kyela District. Undaunted he has preferred this appeal. Mr Naali, learned counsel, acts for him and Mr Mushokorwa, learned advocate, represents the respondents.

Mr Naali contends that the respondents trespassed on the suit land in abrogation of the vested interests enjoyed by the Kyangala villagers. It seems to be in that connection that learned counsel argues that the appellate District Court slipped into error when it upheld the finding of the trial court that the appellant had failed to prove his case. For it is learned counsel's view that there was sufficient preponderant evidence upon which the suit was proved. The invasion of the suit land, therefore disturbed well established rights which had been enjoyed by the Kyangala by the Kyangala villagers from 1965 until 1996 when the respondents trespassed on their land.

Mr Naali takes exception with the defence case which was based on the testimony of what he says was a single witness. Obviously there is no reason why time should be spent on this part of the argument because the Record of Proceedings shows clearly that three witnesses were called by the defence.

There is the issue of legal representation. Learned counsel contends that one of the most absurd situations in this case which the first appellate court overlooked is the order regarding a representative suit, especially the defence. He argues that it is not established that Donald Mwakalinga (SU1) obtained the consent of his co-defendants to be their legal representative, nor was there any application that

was filed and was allowed in that behalf. For 21 of the defendants offered no defence so that the testimony of SU1, standing alone, offended the law the consequence of which nullifies the proceedings before the two subordinate courts.

Mr Mushokorwa has also strenuously argued his case, citing several authorities in support of his submissions. By and large, he introduces no new ground. I will, therefore, cover his submissions as I consider the issues that Mr Naali raises in the Memorandum of Appeal. The first issue is whether the respondents are trespassers. It is my considered view, and I so hold, that this contention is untenable. For all indications are that it has been propagated without serious consideration of the evidence on record. I am sure the appellant would have achieved his mission in his attack on the defence if he had advanced grounds at the trial upon which the testimony of (SU3), the CCM District Chairman, could have been impeached. He never attempted it at the trial nor did he do so before the first appellate court. My examination of the record leaves no doubts that the findings of the trial, as well as the first appellate court are founded on strong evidence. It can be said that is is beyond reasonable controversy that indeed it was proved that the rights in the suit land date as far back as the forerunners of the residents of Kyangala and Ilopa villages, all of whom lived in one village. It was also established that Kyangala villagers and Ilopa villagers have their shambas with common borders. That this is so is clearly shown in the trial court's observations as contained in its report of what it saw when it visited the *locus in quo*. The two Lower courts were, therefore, correct in holdings that the respondents had good title to their parcels of land in Kyangala village. As such, a claim by which it is sought to extinguish such rights cannot find favour with the law.

Now Mr Naali submits as if Order 1, rules 8 and 12 of the Civil Procedure Code applied to the defence. That contention is untenable for the reason that the Civil Procedure Code, 1966, is not applicable to proceedings of a civil nature prosecuted in Primary Courts. As Mr Mushokorwa contents Order 1, rules 8 and 12 were cited out of



context. Such proceedings are governed by the Primary Courts Civil Procedure Rules which were made under section 65 of the Magistrate's Courts Act 1963, and which were published as Government Notice Number 310 of 1964. These rules do not make provision for a representative suit. However, where a plaintiff impleads more defendants than one as is the case here, rule 26(1) of those rules provides that:

> (1) Where there are more defendants than one who have been duly served, and one or more of them appear, the hearing shall proceed and the court shall, at the time of giving its decision, make such order as it thinks fit to the defendant who did not appear...

The law is quite clear. It follows that even if SU1 alone had testified, no law would have been breached as contended by Mr Naali. Instead the contrary would have applied if, without sufficient cause, the trial Primary Court had failed to proceed with the trial once it was satisfied that, although only one of the defendants appeared, all of them were duly served. Again this contention would fail. Upon the above considerations the appeal fails and it is dismissed with costs.

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## LAMSHORE LIMITED AND J.S. KINYANJUI v. K.U.D.K.

HIGH COURT OF ZANZIBAR
AT VUGA

(Kannonyele, J.)

CIVIL CASE No. 13 OF 1994

*Contract – Privity of contract – Second plaintiff a shareholder and signatory for and on behalf of first plaintiff company – Whether second plaintiff can sue on the contract in his own name.*